

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MARK ANDERSON,

Plaintiff(s),

v.

WESLEY S. WHITE, et al.,

Defendant(s).

Case No. 2:13-CV-2097 JCM (VCF)

ORDER

Presently before the court is defendants', Wesley S. White and the law offices of Wesley S. White ("defendants"), motion for summary judgment and motion in the alternative to dismiss under rule 12(b)(1). (Doc. # 40). Plaintiff Mark Anderson ("plaintiff") filed an opposition (doc. # 49) and defendant filed a reply. (Doc. # 52).

**I. Background**

Plaintiff Mark Anderson retained defendant Wesley S. White, an attorney duly licensed to practice law in Nevada, to represent him in a dissolution of marriage proceeding against his former wife. (Doc. #1 at 10). Defendant filed the divorce complaint on plaintiff's behalf on March 30, 2012. *Id.* at 11. Counsel for plaintiff's former wife filed an answer and counterclaim on April 16, 2012. *Id.*

Defendants agreed to participate in a settlement conference before the Honorable Robert Gaston on May 9, 2012. *Id.* At the settlement conference, plaintiff and his wife signed a memorandum of understanding ("MOU"), which outlined a settlement. *Id.* at 43-50. Later, the plaintiff alleged that the "Wilson Property" was improperly disposed of in the MOU. *Id.*

Shortly after the settlement conference, plaintiff terminated his relationship with defendant and retained replacement counsel. (Doc. #1 at 12.) On June 29, 2012, counsel for plaintiff's former

1 wife filed a motion to enforce settlement. *Id.* Plaintiff's replacement counsel filed an opposition to  
 2 motion to enforce settlement and countermotion to set aside and deem the memorandum of  
 3 understanding unenforceable, which was unsuccessful. *Id.* Thereafter, replacement counsel  
 4 appealed the judge's order granting the motion to enforce settlement. (Doc. #1 at 34-36). That  
 5 appeal is currently pending before the Nevada Court of Appeals. *Id.*

6 Plaintiff's complaint asserts six causes of action including: (1) legal malpractice; (2) breach  
 7 of contract; (3) breach of fiduciary duty; (4) breach of implied covenant of good faith and fair  
 8 dealing; (5) negligent infliction of emotional distress; and (6) vicarious liability. (Doc. #1).  
 9 Plaintiff alleged defendant committed malpractice by advising plaintiff that the "Wilson property"  
 10 was likely to be adjudicated as community property. *Id.* As a result, plaintiff initiated this action  
 11 in state court on September 3, 2013. Defendant removed to this court in November 2013. *Id.*

12 Defendants move for summary judgment or in the alternative to dismiss under rule  
 13 12(b)(1). (Doc. #40).

## 14 **II. Legal Standard**

### 15 *i. 12(b)(1) lack of subject matter jurisdiction*

16 A court must dismiss a plaintiff's complaint for lack of subject-matter jurisdiction. FED. R.  
 17 Civ. P. 12(b)(1). Federal Rule of Civil Procedure 12(b)(1) permits a party to assert this defense by  
 18 motion. *Id.* Although the defendant is the moving party in a motion to dismiss brought under rule  
 19 12(b)(1), the plaintiff is the party invoking the court's jurisdiction and bears the burden of proving  
 20 that the case is properly in federal court. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir.  
 21 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). However,  
 22 a court may raise the question of subject matter jurisdiction *sua sponte* at any time during an action.  
 23 *United States v. Moreno-Morillo*, 334 F.3d 819, 830 (9th Cir. 2003). Regardless of who raises the  
 24 issue, "when a federal court concludes that it lacks subject-matter jurisdiction, the court must  
 25 dismiss the complaint in its entirety." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235,  
 26 163 L. Ed. 2d 1097 (2006).

27 "A plaintiff suing in federal court must show in his pleading, affirmatively and distinctly,  
 28 the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on

1 having the defect called to its attention or on discovering the same, must dismiss the case.” *Tosco*  
 2 *Corp. v. Communities for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001). When presented as a  
 3 factual challenge, a rule 12(b)(1) motion can be supported by affidavits or other evidence outside  
 4 of the pleadings. *United States v. LSL Biotech.*, 379 F.3d 672, 700 n.14 (9th Cir. 2004) (citing *St.*  
 5 *Clair v. City of Chicago*, 880 F.2d 199, 201 (9th Cir. 1989)).

6 Because ripeness pertains to a federal court’s subject matter jurisdiction, it is properly the  
 7 subject of a rule 12(b)(1) motion to dismiss. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).  
 8 Subject matter jurisdiction does not exist over claims which are not ripe for adjudication. *Cardenas*  
 9 *v. Anzai*, 311 F.3d 929 (9th Cir. 2001).

### 10 **III. Discussion**

11 The Ninth Circuit has held that a matter is not ripe “if it rests upon contingent future events  
 12 that may not occur as anticipated, or indeed may not occur at all.” *Scott v. Pasadena Unified Sch.*  
 13 *Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (quotations omitted). The ripeness doctrine has both a  
 14 constitutional component and a prudential component. *Thomas v. Anchorage Equal Rights*  
 15 *Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (quoting *Regional Rail Reorg. Act Cases*,  
 16 419 U.S. 102, 140 (1974) and *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967)).

17 The constitutional component of the ripeness test requires a constitutional case or  
 18 controversy actually exist, “that the issues presented are definite and concrete, not hypothetical or  
 19 abstract.” *Id.* at 1137. The constitutional test has three components: 1) injury in fact that is concrete  
 20 and particularized, and actual or imminent; 2) the injury is fairly traceable to the challenged action  
 21 of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be  
 22 redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Environmental Serv.*, 528  
 23 U.C. 167 (2000).

24 Under the prudential component, the court considers “(a) the hardship that the party  
 25 seeking relief will suffer from withholding judicial action, and (b) the fitness of the issues in the  
 26 record for judicial review.” *Buono v. Kempthorne*, 502 F.3d 1069, 1077 (9th Cir. 2007). A claim  
 27 is “fit for decision” if the “issues raised are primarily legal, do not require further factual  
 28 development, and the challenged action is final.” *Id.*

1 Plaintiff alleges a legal malpractice claim and related causes of action. (Doc. #1). To prevail  
 2 on a legal malpractice claim, plaintiff must show an attorney-client relationship existed, the  
 3 attorney breached his duty, and the breach caused the client's damages. *Semenza v. Nev. Med.*  
 4 *Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988). "The general rule regarding legal  
 5 malpractice actions and appeals is based on the rationale that apparent damage may vanish with  
 6 successful prosecution of an appeal and ultimate vindication of an attorney's conduct by an  
 7 appellate court." *Id.* See also *Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 333  
 8 P.3d 229, 235 (Nev. 2014) (holding if the litigation in which the malpractice occurred continues,  
 9 the damages on which the attorney malpractice action is based remain uncertain).

10 Defendants argue that this court lacks subject matter jurisdiction over plaintiff's claims  
 11 because his claims are not yet ripe for adjudication. Plaintiff contends he has already sustained  
 12 injury in fact and quantifiable damages. (Doc. #49 at 13). Plaintiff's expert alleges damages  
 13 totaling \$267,686.80 with respect to the malpractice claim. (Doc. #49 at 9). He alleges \$210,000.00  
 14 in damages as a result of the settlement agreement and \$57,686.60 damages for the cost of  
 15 replacement and appellate counsel. *Id.*

16 Plaintiff's alleged damages are not consistent with the constitutional component of ripeness  
 17 because they are not yet actual and concrete. As the matter is pending before the court of appeals,  
 18 a possibility exists that the court of appeals could affirm the decision of the lower court, making  
 19 the damages speculative at best. Specifically, plaintiff's claims are not ripe because the issue of  
 20 his potential damages rests on the contingent future event of whether the court of appeals will set  
 21 aside the MOU and further, whether the state court finds the "Wilson property" to be community  
 22 property. Plaintiff can only prove damages if both events occur. See *Ivey v. Spilotro*, 2012 U.S.  
 23 Dist. LEXIS 94162, \*25-26, 2012 WL 2788980 (D. Nev. July 9, 2012).

24 Therefore, plaintiff's damages, if any, are speculative and contingent upon the outcome of  
 25 the underlying claim. Plaintiff's six causes of action in this matter are inextricably related to the  
 26 disposition of the underlying claim in the court of appeals.

27 Although an action against an attorney to recover damages for malpractice must be  
 28 commenced within two years, a litigation legal malpractice action does not accrue until the

1 underlying cause of action has been finally resolved. *See Semanza*, 765 P.2d at 186; Nev. Rev.  
2 Stat. § 11.207(1). The statute of limitations is tolled while an appeal from the adverse ruling is  
3 pending. *Hewitt v. Allen*, 118 Nev. 216, 217, 43 P.3d 345, 345 (2002).

4 Plaintiff requests that this matter be stayed if this court determines the matter is not ripe for  
5 adjudication because he is concerned about the statute of limitations. (Doc. # 40). However, as the  
6 underlying litigation is currently pending before the court of appeals, the statute of limitations on  
7 the malpractice action will not accrue. *See Hewitt*, 43 P.3d at 345.

#### 8 **IV. Conclusion**

9 This matter is not ripe for adjudication. Therefore, this court lacks subject-matter  
10 jurisdiction and must dismiss the complaint in its entirety. Accordingly, this court will not address  
11 the merits of the summary judgment motion.

12 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's motion for  
13 summary judgment (doc. # 40), be, and the same hereby is, DENIED.

14 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's motion in  
15 the alternative to dismiss under rule 12(b)(1) (doc. #40), be, and the same hereby is, GRANTED.  
16 Plaintiff's complaint is DISMISSED WITHOUT PREJUDICE.

17 DATED November 23, 2015.

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19 UNITED STATES DISTRICT JUDGE  
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